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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1732

CENTER SCHOOL DISTRICT No. 58, LEROY BARROWS, Superintendent, CHARLES CREWS, President and EVERT ASJES III, WILLIAM B. BRANDT, JOSEPH S. KENTON, J. K. KIDD, and DIANE SMALLEY, Members of the Board of Education of Center School District No. 58,

Petitioners,

vs.

JOHN GIERINGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on April 20, 1973.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It is set forth in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 20, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION RAISED

Should the First Amendment be construed so as to permit public statements concerning school business by a school teacher representative where, by previous written policy agreement, an obligation and duty exists between the Board of Education, the Administration, and the Teachers of the School District to meet jointly through representatives to engage in free and open dialogue and exchange views on matters of mutual concern in lieu of and/or prior to any public statement being made by either of the entities or a representative thereof.

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

Amendment to the United States Constitution, Article I states in part:

> "Congress shall make no law * * * abridging the freedom of speech * * *."

42 U.S.C. § 1981:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of per-

sons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent (Gieringer), an untenured teacher, originally brought action pursuant to 42 U.S.C. §§ 1981 and 1983 seeking declaratory judgment, injunctive relief, and damages alleging that his constitutionally protected rights to free speech and due process of law had been violated when the Petitioner (Center School District No. 58) did not renew his annual teacher's contract.

Petitioners defended, inter alia, on the basis that Respondent's speech to a community teacher's association violated a previous written policy agreement between Teachers, Administration and Board of Education to act through a committee, known as TAB. That committee, of which Respondent was an active participating teacher representative, was to meet jointly to engage in free and open dialogue and exchange views and facts concerning such subjects of mutual concern as those involved in Respondent's public pronouncement.

The case was tried to the Court resulting in judgment for the Petitioners.

The Court of Appeals reversed the judgment of the District Court on First Amendment grounds and remanded the case for the entry of judgment reinstating Respondent, awarding him loss of back pay, subject to mitigation by Respondent's earnings since his "dismissal" and without any award for punitive damages.[1]

Motion for rehearing was duly filed and by the Court of Appeals, denied.[2]

REASONS FOR GRANTING THE WRIT

This case merits review by this Court on certiorari because under the facts of this case, the decision of the Court of Appeals conflicts with this Court's decision in *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and further conflicts with another Court of Appeals on the same matter in *Simard* v. *Board of Education of the Town of Groton,* 473 F.2d 988 (C.A. 2nd Cir. 1973).

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1. Appendix B—Opinion of the United States Court of Appeals.

2. Appendix C—Denial of Motion for Rehearing.

ARGUMENT

Petitioners Board of Education pursuant to Missouri statutory authority, and upon recommendation of the Superintendent of Schools did not renew a one-year contract of the Respondent, a non-tenured teacher. A full trial in District Court resulted in judgment for Petitioners. As opposed to Respondent's claim that a talk that he made to a Community Teachers' Association meeting was protected under the First Amendment, the District Court ruled "The statements were irresponsible and obviously made to create consternation and dissension. The constitutional guaranty of free speech does not apply to statements such as these, and the Court finds this point against the plaintiff."[3]

The Court of Appeals' Opinion Conflicts with This Court's Decision in Application of Pickering v. Board of Education

The only case cited and relied upon by the Court of Appeals in delineating the facts of this case is *Pickering* v. *Board of Education.*[4] In *Pickering,* a public school teacher wrote a letter to the editor of a local newspaper criticizing the way in which the Board of Education and the Superintendent of Schools had handled certain matters. This Court held at 391 U.S. 569-70 that the statements are in no way directed toward any person with whom appellant (Pickering) would normally be in contact in the course of his daily work as a teacher. Thus no ques-

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3. Appendix D—Unreported Memorandum and Judgment of District Court.

4. *Pickering* v. *Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

tion of maintaining either discipline by immediate superiors or harmony among coworkers was presented.

To the contrary, the Respondent's speech was made at a Community Teachers Association meeting and, as the district court held,[5] "this report created a furor * * *." The next meeting of the committee was explosive and stormy, but the Respondent appeared to be delighted that his report had caused such controversy and dissension and had upset every person on the TAB committee except himself.

In *Pickering*, this Court held at 391 U.S. 572 "accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them," to which this Court footnoted that there was likewise no occasion furnished by Pickering for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public. Mr. Justice White in his dissent commented in that regard at 391 U.S. 582 that the Court did not elaborate upon its suggestion that there may be situations in which, with reference to certain areas of public comment, a teacher may have special obligations to his superiors. Further, that this Court's opinion does not foreclose the possibility that under the First Amendment a school system may have an enforceable rule, applicable to teachers, that public statements about school business must first be submitted to the authorities to check for accuracy.

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5. Appendix D—Unreported Memorandum and Judgment of District Court.

Here, in *Gieringer*, there existed an even stronger responsibility and obligation on Respondent's part to first submit his information to a joint meeting of TAB committee before publishing the same. The Teachers, Administration and Board of Education entered a joint policy agreement on July 1, 1969,[6] respecting good faith relationships and effective communications between these entities and required them to meet jointly to engage in free and open dialogue and exchange views on such matters as were the subject of Respondent's speech of October 14, 1969, to the Center Teachers Association. Gieringer was one of two teacher-representatives on that TAB committee. The response of the Petitioners' Superintendent of Schools, after the October 14th speech, was his letter of October 20, 1969,[7] to Respondent that his speech was irresponsible, unethical and unprofessional and further, that his conduct did little to confirm the good faith and common concern concepts of the Teachers, Administration, Board Agreement.

These facts belie the conclusion reached by the Court of Appeals in its finding that none of the indicia recounted in *Pickering* would take such public expression out of the sphere of protected activity, since Respondent's speech was not protected within the constitutional standards delineated in *Pickering* by this Court.

The First Amendment gives a teacher the right to speak his mind; but it does not give him the right to disrupt a school or to sabotage its programs.[8]

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6. Appendix E—Policy Agreement.

7. Appendix F—Superintendent's Letter.

8. *Tinker* v. *DesMoines School District*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731, et seq. (1969); *Glover* v. *Daniel*, 319 F. Supp. 1070, 1075 (D.C. N.D. Georgia-Newman Division 1969).

The Court of Appeals' Decision Conflicts with a Decision of Another Court of Appeals on the Same Matter

The Second Circuit Court of Appeals decided *Simard* v. *Board of Education of the Town of Groton.*[9] Therein, Simard, a teacher, as in *Gieringer,* was denied tenure by the Board of Education's decision not to renew his one-year contract. Simard claimed the denial was founded on his teacher associated activities in contract negotiations with the Board of Education. Simard in relying on *Pickering* claimed at 966 that the defendant (School Board) had failed to make a showing under *Pickering* because the altercation between him and the school principal occurred in the privacy of the high school office. The Second Circuit Court of Appeals ruled this argument without merit and held that Simard's reliance on *Pickering* was misplaced. That Court found that, in *Pickering* the teacher's speech was in no way directed towards any person with whom he would normally be in contact in the course of his daily work. Gieringer's remarks were made to his fellow teachers at a Community Teachers' Association meeting. Therefore, by contrast, Simard's remarks (as under the facts in *Gieringer*), manifestly threatened significant working relationships vital to the administration of the school. The Court added that no evidence on the record is needed to prove that truism. Especially is this true in view of the previously adopted TAB Policy Agreement to which Gieringer, as a teacher-representative to that committee, was a privy party.

Thus, the Eighth Circuit Court of Appeals in *Gieringer* has taken a conflicting view of *Pickering* to that of the Second Circuit Court of Appeals in *Simard* on the same matter.

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9. *Simard* v. *Board of Education of the Town of Groton,* 473 F.2d 988 (Jan. 1973).

Viewed in the Light of Gieringer's Conduct and Attitude in Prior Years, His Speech Was Not Protected under the First Amendment

The Court below stated that the Respondent, who had been hired previously on successive one-year contracts, had, for his last annual contract, been transferred to another school in the District and concluded that this eliminated earlier frictions and *cleared the air.*

The Superintendent of Schools recommended non-reemployment of Respondent twice, once in 1969 and again in 1970, both of which recommendations were premised upon Respondent's abuse of contractual privileges, inconsideration of his co-workers, failure to cooperate with his administrators and supervisors, and making irresponsible statements calculated to demean others. The Superintendent was concerned as to Respondent's speech of October 14, 1969, only as it represented a continuation of the complaints about Respondent cited in the non-reemployment recommendation in 1969.

Thus, the Court below refused to consider the actions of Respondent prior to October 14, 1969, which contravenes rulings by other federal courts including *Calvin* v. *Rupp*[10] which held at page 362 that although it is true that even as of April 1st the school board would not have rescinded the offer of re-employment but for the situation which became known to them subsequent to March 11, nevertheless the members of the board (of education) could not reasonably be expected to completely divorce from their minds the plaintiff's known deficiencies when reappraising the offer of reappointment.

The limited view of the Court below also contravenes a prior determination of the 8th Circuit Court of Appeals

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10. *Calvin* v. *Rupp*, 334 F.Supp. 358, Eastern District, Missouri, Northern Division (Oct. 1971).

in *Freeman* v. *The Gould Special School District of Lincoln County, Arkansas,*[11] where at 1161 the Court ruled that there must be some degree of harmonious cooperation in school administration to insure an efficient use of public funds and a reasonably satisfactory school program. School boards, it was held, are representatives of the people and should have a wide latitude and discretion in the operation of the school district, including employment and rehiring practices.

Other cases supporting the principle of law that evidence of prior acts and characteristics showing gross inefficiency is competent to prove a present existing state thereof are noted.[12]

Thus, the Eighth Circuit Court of Appeals in Gieringer has taken a conflicting view to a prior decision of its own as well as a District Court's decision on the same matter.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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11. *Freeman* v. *The Gould Special School District of Lincoln County, Arkansas,* 405 F.2d 1153 (C.A. 8th Cir. 1969).

12. *Powell* v. *Young,* 74 N.E.2d 261 (Ohio, 1947); *Redcay, Prosecutor* v. *State Board of Education,* 33 A.2d 120 (N.J. 1943); *State* v. *Peterson,* 294 N.W. 203 (Minn. 1940); *Hebert* v. *Lafayette Parish School Board,* (dissent) 146 So.2d 848 (La. 1962).